TABLE OF CONTENTS

	Page
Questions Presented	1
Counterstatement of the Case	2
Reasons for Denying the Writ	6
Conclusion	13
Appendix A	14

AUTHORITIES RELIED UPON

Cases:

Confederated Bands of Ute Indians v. *United States*, 100 Ct.Cl. 413 (1943)	3
Confederated Bands of Ute Indians v. *United States*, 117 Ct.Cl. 433 (1950)	5, 11
Creek Nation v. *United States*, 370 U.S. 157	9
Gila River Pima-Maricopa Indians, et al. v. *United States*, 135 Ct.Cl. 180 (1956); 157 Ct.Cl. 941 (1962)	10
Graver Mfg. Co. v. *Linde Co.*, 336 U.S. 271	12
Hendrie v. *Lowmaster*, 152 F.2d 83 (C.A. 6, 1945)	12
Menominee Tribe v. *United States*, 101 Ct.Cl. 10 (1944)	8
Menominee Tribe v. *United States*, 107 Ct.Cl. 23 (1946)	8
Otoe and Missouria Tribe v. *United States*, 131 Ct.Cl. 593 (1955), *cert. den.*, 350 U.S. 848	9
Pen-Ken Gas & Oil Corp. v. *Warfield Natural Gas Co.*, 137 F.2d 871 (C.A. 6, 1943)	12
Peoria Tribe v. *United States*, 390 U.S. 468	9
Sioux Tribe, et al. v. *United States*, 105 Ct.Cl. 725 (1946)	8
Sioux Tribe, et al. v. *United States*, 12 Ind.Cl.Com. 541 (1963)	8

Page

Southern Ute Tribe v. *United States*, 17 Ind.Cl. Com. 28 (1966) 8
St. Paul Indemnity Co. v. *Cab Co.*, 303 U.S. 283 10
Union Pacific Ry. Co. v. *Mason City, etc. Ry. Co.*, 222 U.S. 237 12

Treaties and Statutes:

Act of March 2, 1868, 15 Stat. 619 2
Act of April 29, 1874, 18 Stat. 36 2
Act of April 1, 1880, 21 Stat. 270; 25 U.S.C. 161 8
Act of June 15, 1880, 21 Stat. 199 ..... 2, 3
Act of July 28, 1882, 22 Stat. 178 3
Act of May 1, 1888, 25 Stat. 133 3
Act of February 20, 1895, 28 Stat. 677 ..... 1, 2, 3, 4, 7
Act of February 12, 1929, 45 Stat. 1164 8
Act of June 13, 1930, 46 Stat. 584; 25 U.S.C. 161a, 161b 8
Act of August 13, 1946 (Indian Claims Commission Act), 60 Stat. 1049; 25 U.S.C. 70, *et seq.* 4, 5
R.S. § 3659, 31 U.S.C. 547a 7

Other:

Indian Land Cessions in the United States, Charles C. Royce (18th Ann.Rep., B.A.E. 1896-1897) 2
Rule 20, Rules of Supreme Court, 28 U.S.C. 34 6
Sen. Doc. 194, 76th Cong., 3d Sess., Vol. V, Indian Laws and Treaties, Charles J. Kappler, pp. 659-660 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 515

UNITED STATES OF AMERICA,
Petitioner,

v.

SOUTHERN UTE TRIBE OR BAND OF INDIANS,
Respondent.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

This brief is filed by respondent, Southern Ute Tribe, in opposition to the petition of the United States for a writ of certiorari to review the interlocutory judgment of the United States Court of Claims entered in this case on March 20, 1970.

QUESTIONS PRESENTED

1. Whether the United States, as trustee of the Southern Ute funds collected through the disposal of tribal reservation lands pursuant to the Act of February 20, 1895, 28 Stat. 677, is required, where the Indian claim was for a "true, complete and proper accounting" of such funds, to account for its handling of the tribal funds up to date, when a report filed by the United States in 1953 disclosed

that the governmental wrongdoing began in 1899 and has a continuing effect.

2. Whether the claim is barred by *res judicata*, where the court below held that the lands involved in this case were disposed of by the United States under the 1895 Act and not, as the government had insisted, under a prior 1880 Act which included lands involved in an earlier settlement agreed to by another claimant, the Confederated Bands of Ute Indians, and approved by the same court.

COUNTERSTATEMENT OF THE CASE

In an 1868 treaty, the Confederated Bands of Ute Indians, including the Southern Ute Tribe, respondent here, agreed to a cession of their ancestral homeland and retained a smaller reservation in western Colorado which the United States promised to hold for their "absolute and undisturbed use and occupation" (15 Stat. 619).[1] By another agreement, ratified as amended by the Act of June 15, 1880 (21 Stat. 199), the Confederated Bands ceded to the United States in trust for disposal the 1868 treaty reservation,[2] except for an area retained for the Southern Utes, who "agree[d] to remove to and settle upon the unoccupied agricultural lands on the La Plata River, in Colo-

[1] Appendix A shows the retained area. It is a diagram of part of Map 9, Areas 556, 616 and 617, Charles C. Royce, *Indian Land Cessions in the United States*, Colorado 1 (18th Ann.Rep., B.A.E. 1896-1897, Part II).

[2] In 1873, the Confederated Bands ceded a highly-mineralized, square-shaped, area in the east-central portion of the 1868 treaty reservation, comprising about 3.7 million acres (18 Stat. 36; Royce Area 566). This left intact a strip of land in the southwest corner of Colorado, 15 miles wide and 110 miles long (Royce Area 617). This was part of the area the Southern Utes had previously occupied and it became the Southern Ute Reservation. This strip was connected with the main body of the diminished 1868 treaty reservation by a corridor of land 20 miles across along the eastern Utah border. Lands in the 15-mile strip are involved in the present case. See Appendix A and the description of the events by the Court of Claims in the decision below (Pet.App. 16).

rado." [3] This area was within the 1868 treaty reservation area, was the area historically occupied by the Southern Utes, and was thereafter known as the Southern Ute Reservation.

From and after the 1880 Act, as before that date, the Southern Utes continued to live on their reservation in southern Colorado. It is where they were furnished assistance by the government and it has been administered at all times since by the United States as the Southern Ute Reservation. The 1880 Act, and subsequent Congressional enactments, provided for the removal of all other groups of Confederated Utes from Colorado and for the disposal of the former 1868 treaty reservation under the public land laws.[4] But the Southern Utes were treated differently from the other Utes. They retained their reservation in southwest Colorado where they had long resided, were then residing and on which they still reside.[5]

If there were any inconsistencies in the year-by-year governmental relations with the Southern Utes after the 1880 Act, they were resolved by the Act of February 20, 1895 (28 Stat. 677). That Act was similar to the 1880 Act in that it authorized allotments of lands to individual

---

[3] Royce Area 617.

[4] These include: the Act of July 28, 1882, 22 Stat. 178, declaring all of the former 1868 treaty reservation, except the Southern Ute Reservation, to be public lands of the United States and authorizing a partial boundary survey of the Southern Ute Reservation; the Act of May 1, 1888, 25 Stat. 133, authorizing negotiations with the Southern Utes for an exchange of "their reservation"; and the almost annual Congressional reports on the Southern Ute situation. This chronology of events was thoroughly considered by the court below. Pet.App. 19-25.

[5] The government's statement that "For a while," the Southern Utes "were permitted to remain" on the 15-mile strip is incomplete and inaccurate (Pet. 3). The Southern Ute Reservation is still there and the Southern Utes are still there, as they have been since a long time prior to 1880. All other Utes were removed from Colorado by 1882. *Confederated Bands of Ute Indians* v. *United States*, 100 Ct.Cl. 413, 417 (1943).

Southern Utes and the disposal of the unallotted, surplus lands to settlers, the proceeds to be held in trust for the sole use and benefit of the Southern Utes (28 Stat. 679). Thus, it was only by the 1895 Act that the United States for the first time obtained authorization from the Southern Utes to dispose of the surplus lands on their reservation.

Disposals of Southern Ute reservation lands were made under the 1895 Act, and the proceeds were collected and held by the United States. The result was that a set of Southern Ute land disposition accounts was maintained by the United States in the name of and for the benefit of the Southern Utes under the 1895 Act,[6] completely separate and apart from the 1880 Act land disposition accounts maintained for the remainder of the former 1868 treaty reservation lands in which all of the Confederated Bands of Ute Indians shared.[7]

On August 10, 1951, the Southern Ute Tribe filed the two claims here involved under the Indian Claims Commission Act (60 Stat. 1049). Both claims arose out of the 1895 Act. One claim was for just compensation for the taking by the United States of over 220,000 acres of Southern Ute reservation land by giving it away to settlers as free homesteads without payment of compensation to the Tribe, and the other was for a "true, complete and proper accounting" of the trust proceeds received by the United States from the disposal of an additional 82,000 acres of surplus reservation land.[8]

---

[6] These funds were collected by the Department of the Interior and carried on the United States Treasury books under the heading "Proceeds of Southern Ute Reservation."

[7] The Southern Ute lands not disposed of pursuant to the Act of 1895 were restored to tribal ownership by order of the Secretary of the Interior on September 14, 1938. Sen.Doc. 194, 76th Cong., 3d Sess., Vol. V, Indian Laws and Treaties, Charles J. Kappler, pp. 659-660.

[8] A claim is asserted in a "petition" in the Indian Claims Commission and the Court of Claims. In order to avoid confusion be-

The government asserted the defense of *res judicata* as to both claims. This defense was based on a 1950 stipulation of settlement and judgment entered thereon by the Court of Claims in a case brought by the Confederated Bands of Ute Indians (117 Ct.Cl. 433). The defense was rejected by the Commission and the Commission was affirmed on appeal by the Court of Claims (Pet.App. 30-32, 40). The government is therefore obligated to pay just compensation for the taking of 230,547.44 acres, according to respondent's latest tally, with the value to be assessed after another hearing by the Commission.

In response to the complaint, the government supplied a report by the General Accounting Office dated February 18, 1953.[9] It purported to furnish the accounting requested in the complaint. In accordance with pleading procedures established prior thereto by the Indian Claims Commission, the Tribe filed exceptions to the accounting report.[10] The government now asserts such exceptions constitute "new claims" barred by the limitation included in the Indian Claims Commission Act (60 Stat. 1052; 25 U.S.C. 70k). The Commission held that since the Tribe had requested an accounting for the handling of its funds, the government was obligated to furnish a "further and complete accounting" based on the matters revealed in the report furnished in response to the complaint (Pet.App. 81-82). The Court of Claims held that the Tribe's exceptions constituted amendments to the original complaint, that they related back to the date of filing, and that the original complaint had sufficiently apprised the govern-

---

tween those and the petition for certiorari, the petition in the Indian Claims Commission will be referred to herein as the "complaint." The complaint also included a prayer for "such other and further relief as the Commission may deem fair and equitable."

[9] The government's answer to the complaint was filed approximately three years after the GAO report was filed.

[10] See p. 8, *infra*, fn. 15.

ment of the scope of the claim.[11] As the Commission indicated (Pet.App. 83), defendant has not responded to the exceptions, but has rested its defense entirely on other grounds.[12]

REASONS FOR DENYING THE WRIT

1. Contrary to the assertion by the government, the decision of the Court of Claims will not expand the jurisdiction of the Indian Claims Commission, nor will it jeopardize the government's ability to conclude cases within a reasonable time (Pet. 6). The decision is restricted to the unique and isolated situation involving the Southern Ute Tribe. Whatever examples horrible are conjured in the petition for certiorari, the only visible effect of the decision below is correctly summarized by the government's statement that it "does not in itself involve legal issues of general importance" (Pet. 12).[13] The decisions of the Court of Claims and the Indian Claims Commission do no more than provide for procedural compliance in disposing of claims involving tribal lands and accounting for trust funds[14]—something which the Indians assumed the United States had been properly doing through the years.

---

[11] Pet.App. 38-40. Although the rationale of the court differs from that of the Commission (Pet.App. 39), both reached the same result. The Court of Claims pointed out that the Commission had not had the benefit of controlling determinations by the court between the Commission's ruling and the date this case reached the Court of Claims (Pet.App. 39).

[12] Since there has been no reply by petitioner, nor a hearing on the exceptions, it is well to remember that this case is still in an interlocutory posture. Any unjustified requests for accounting can be sorted out by the Commission at the hearing.

[13] It is difficult to determine whether this concession relates only to the accounting claim. In any event, it would seem to apply with equal force to the just compensation claim. *Cf.*, Rule 20, Rules of this Court.

[14] In discussing one of its obligations as trustee to the Southern Utes under the 1895 Act, the government conceded it "did not honor that obligation" (Pet. 4).

The generosity attributed by the government to the decision of the Court of Claims is a contrived effort to manufacture a reason for granting the writ. The rationale of the court below is well founded. It undertook a review of its prior decisions and judgments involving the Confederated Bands of Ute Indians, including the Southern Utes, to see whether the present claims had been previously concluded, and determined they had not. It then affirmed the Indian Claims Commission decision as to the taking and accounting claims (Pet.App. 41). Nothing done by the court below or the Indian Claims Commission expands the jurisdiction of the Commission.

The idea that the government perceives the decision of the Court of Claims to be wrong (Pet. 12) is no ground for review by this Court. There is no suggestion of conflict and none exists. No constitutional or general questions are involved, no final judgment has been entered (Pet.App. 41), and due regard should be taken of the Commission's interlocutory order for "further proceedings" before that tribunal "to insure a complete record" (Pet.App. 83).

2. The government overstates what is involved in the accounting claim. In 1951, the Southern Ute Tribe sought "a true, complete and proper accounting" of its trust funds collected by the United States from the disposal of some 82,000 acres of its reservation land under the 1895 Act. The funds were to be held by the United States "in trust" for the sole use of the Southern Utes (28 Stat. 678). The government has not accounted for those funds. In 1953, the government furnished a partial and largely uninformative list of moneys received and annual itemizations of disbursements, which were carried on the books of the United States Treasury under the heading "Proceeds of Southern Ute Reservation." These had been collected pursuant to the 1895 Act during the period April 13, 1899 to June 30, 1951. Although these were trust funds and federal law required the payment of 5 per cent in interest on all such accounts (R.S. § 3659, 31 U.S.C.

547a; Act of April 1, 1880, 21 Stat. 270, 25 U.S.C. 161), it was not, strangely enough, until 1929, and under a completely different authority, that the government condescended to pay any interest at all for the use or retention of the Tribe's money, and then at only 4 per cent (Acts of February 12, 1929, 45 Stat. 1164, and June 13, 1930, 46 Stat. 584, 25 U.S.C. 161a, 161b).

Following the usual practice of the Indian Claims Commission in accounting cases,[15] the Tribe filed "exceptions" to the General Accounting Office report. These exceptions did not create "new" or "general" accounting claims. They were rather the specific assertions, for this claim, of principles of accounting long established in cases involving Indian trust funds derived from the disposals by the United States of tribal lands and natural resources.[16]

---

[15] The exceptions to the report conform to the pleading procedure established by the Indian Claims Commission. *Sioux Tribe, et al.* v. *United States*, 12 Ind.Cl.Com. 541 (1963). They are pleadings in the case (Pet.App. 83) and were treated by the Court of Claims as amendments to the complaint which relate back to the original filing date (Pet.App. 39-40).

[16] The issues raised by the exceptions relate to the government's handling of the trust funds derived from tribal land disposals. We apply to this case the time-honored fiduciary standards under which the government, as trustee, owes a distinctive obligation to the Southern Utes. All are settled principles of accounting. *Menominee Tribe* v. *United States*, 101 Ct.Cl. 10, 20-22 (1944); *Sioux Tribe, et al.* v. *United States*, 105 Ct.Cl. 725, 801-802 (1946); *Menominee Tribe* v. *United States*, 107 Ct.Cl. 23, 32-33 (1946). Based on this authority, the Commission found as follows:

> "20. Petitioner [Southern Ute Tribe] is entitled to recover the total amount by which its funds would have been increased (1) through the payment of interest at 5% per annum, beginning not later than 30 days after the money came into defendant's possession, on moneys received by defendant from sales of petitioner's lands; (2) through the payment of interest at 4% after July 1, 1930, on any other interest-bearing moneys until actually expended by the defendant for valid purposes; (3) if the erroneous transfers acknowledged by defendant had not been made; and (4) through expenditures from noninterest-bearing moneys before expenditures from moneys which earned or should have earned interest." 17 Ind.Cl.Com. 28 at 41.

They simply make even more specific the original plea for a "true, complete and proper accounting" and could not have been made until we had reviewed the report filed by the government in this case—a report which contained what the court below characterized with charity as "various ignoble confessions" (Pet. App. 39).

Although insistent that "new claims" were filed after the statute of limitations expired, the government supports its assertions by arguing that (1) Congress is impatient to have all Indian claims finally adjudicated, and (2) the few accountants now employed by the government to prepare reports dealing with Indian claims cases cannot physically handle the work load (Pet. 6-10).

As to Congressional impatience, we are constrained to remind the government that the Indian Claims Commission Act was adopted to provide for the final adjudication of all claims—an objective which the petitioner seems now to wish to avoid. Upon a complete review of the legislative history, especially the reasons for enacting the Indian Claims Commission Act, the Court of Claims recognized that Congress intended all tribes "should be given the right to have their day in court and have their claims adjudicated," *Otoe and Missouria Tribe* v. *United States*, 131 Ct.Cl. 593, 608-622 (1955), *cert. den.*, 350 U.S. 848. The Act was intended to settle all tribal claims once and for all. The Indian Claims Commission was set up as the tribunal charged with the duty to adjudicate all such claims. This Court has granted certiorari on two occasions involving claims which originated in the Indian Claims Commission. In one, *Peoria Tribe* v. *United States*, 390 U.S. 468, it reversed the Court of Claims and required that the goveernment pay interest as a measure of damages for its failure to invest funds in accordance with a treaty. The other was affirmed by an evenly divided Court. *Creek Nation* v. *United States*, 370 U.S. 157.

As to the physical problem of rendering a proper accounting, the specter of aging employees working themselves into retirement seems particularly irrelevant. Under this peculiar logic, the longer the government can avoid the issue, the less ability it will have to provide the accounting, and the more likely it can escape the accounting altogether. The government's assertion that to fulfill its trustee obligations "would be [a] substantial" task (Pet. 10) comes with doubtful taste for this same petitioner allowed the Indian Tribal Claims Branch of the General Services Administration to decay to a point where it now claims the staff is unable to fulfill the requirements of the Indian Claims Commission Act.

What remains is something about the up-to-date accounting required by the Commission and the court below (Pet. App. 40). The Court of Claims applied the elementary principle that once jurisdiction attaches the court is entitled to see the matter through.[17] That court has applied this principle in an Indian accounting claim, *Gila River Pima-Maricopa Indians, et al.* v. *United States*, 135 Ct.Cl. 180, 186 (1956); 157 Ct.Cl. 941 (1962).[18] Jurisdiction having lodged, the Commission was empowered to order an up-to-date accounting for the continuing governmental wrongdoing which predated and postdated the statutory filing date (Pet.App. 40).

In order to compute what should have been done with the 1895 Act trust funds in the first instance, perhaps the government will have to take into consideration the tribal moneys held in other accounts. This is so because the government's failure to account properly and completely in the first instance permeates the whole history of the ac-

---

[17] *St. Paul Indemnity Co.* v. *Cab Co.*, 303 U.S. 283, 291-292.

[18] The government did not seek certiorari in the *Gila River* case. The Commission, the Court of Claims and Indian claimants have been proceeding in accordance with that ruling since 1956. It now seems late in the game for the government to challenge what the Court of Claims decided was a "good rule." (135 Ct. Cl. at 186).

count. It also permeates the other accounts. Had it paid over promptly the proceeds from the 1895 Act transactions, it is possible that funds in other interest-bearing accounts could have been left undisturbed. A specific accounting is required to develop the interrelationship. This is the "true, complete and proper accounting" which the Southern Ute Tribe has been trying to get since 1951, and to which it was entitled at a much earlier date. The evident desire of the petitioner to avoid the supplemental accounting seems more directed to the concealment of additional ignoble confessions than toward its concern over the procedural issues decided against it. As the Court of Claims pointed out, the government offered no objections to the substance of the rulings on the exceptions to the accounting filed by the Indians (Pet.App. 38).

3. In its second question, the petitioner quibbles with the court below over the scope of a 1950 judgment based on a stipulation of settlement between the Confederated Bands of Ute Indians (including the Southern Ute Tribe) and the United States (117 Ct.Cl. 433). Petitioner tells the Court that unless its plea of *res judicata* in this case is upheld, other Indian tribes may attempt "repudiation" of settlements. No such thing is remotely involved.

What is at stake here is whether the government must pay just compensation for the taking of some 230,000 acres of the Southern Ute reservation land in a manner not sanctioned by the 1895 Act authorizing the disposition of such land, or whether the subject land was part of the 1950 settlement under which the government paid for almost 1,362,000 acres *outside* the Southern Ute Reservation owned by the Confederated Bands of Ute Indians and disposed of under the 1880 Act for their credit. All agree that the subject 230,000 acres are not among the tract-by-tract description of the acreage comprising the land upon which the 1950 settlement stipulation was based. If included at all, the subject land must be covered by an over-all phrase in the stipulation settling

claims for "land formerly owned or claimed by plaintiffs [including the Southern Ute Tribe] in western Colorado, ceded to defendant by the Act of June 15, 1880 (21 Stat. 199)" (Pet.App. 30-32). Since the Southern Ute Reservation was not ceded by that Act, it was not included in the stipulation in 1950.

After an exhaustive examination, the court below determined that the subject lands were ceded to the United States for disposal for the benefit of the Southern Utes by the 1895 Act and not for the Confederated Utes by the 1880 Act (Pet.App. 14-30). All that happened was that the Court of Claims reviewed one of its prior judgments and concluded that the present claim was not involved in the prior case. This thorough review by the Court of Claims, coupled with the independent consideration of the Commission, resulted in conclusions that the 1950 stipulation covered the 1880 Act lands, but the 1880 lands did not include the subject land; therefore, the stipulation was no bar to the present claim (Pet.App. 30-32, 70-79).[19] Even assuming that the 1950 judgment by settlement was susceptible of more than one construction, the Court of Claims was bound to adopt the one which renders the case more reasonable and effective under all the circumstances. *Union Pacific Ry. Co.* v. *Mason City, etc. Ry. Co.*, 222 U.S. 237, 246-247; *Hendrie* v. *Lowmaster*, 152 F.2d 83 (C.A. 6, 1945); *Pen-Ken Gas & Oil Corp.* v. *Warfield Natural Gas Co.*, 137 F.2d 871, 885 (C.A. 6, 1943).

Petitioner is pressing for this Court's attention to factual and procedural questions ruled against it by opinions of the tribunals below. No questions meriting certiorari are presented.

---

[19] This seems a fact determination which should not be upset by this Court "in the absence of a very obvious and exceptional showing of error." *Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275.

CONCLUSION

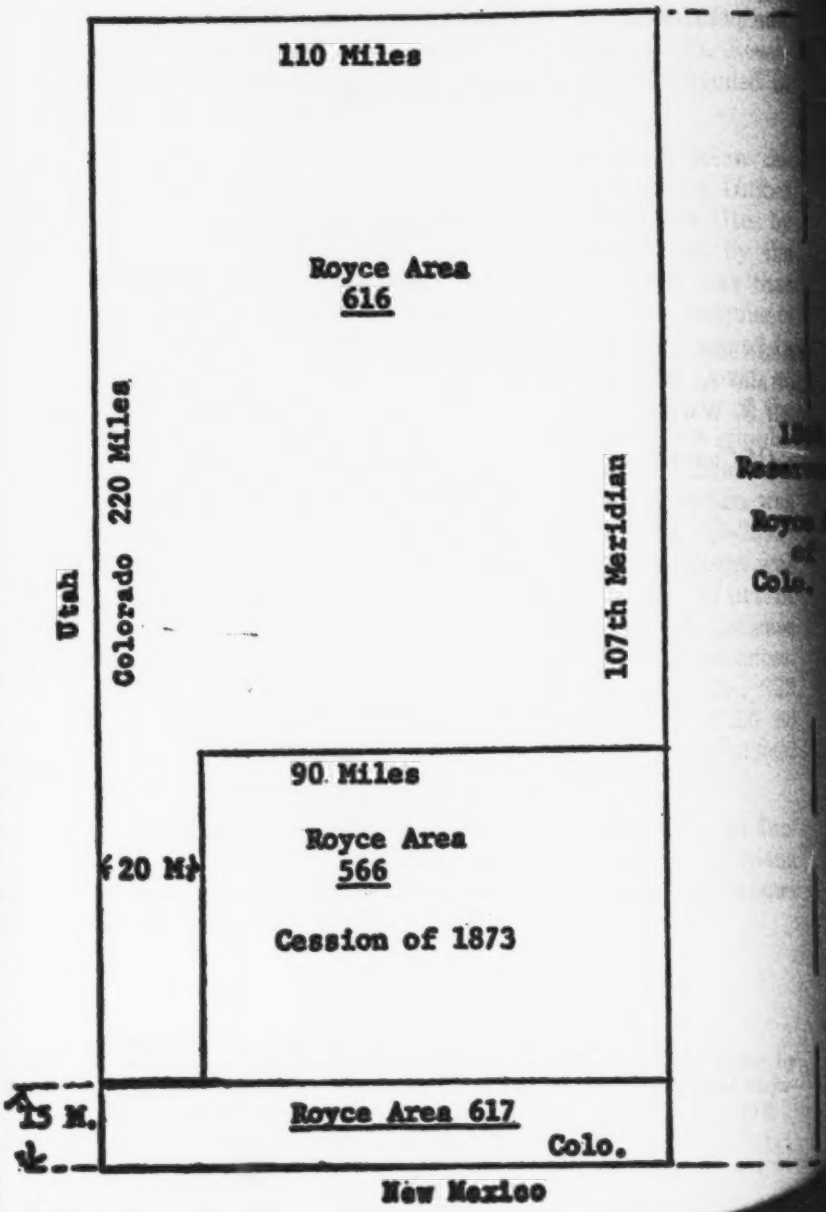
The petition for a writ of certiorari should be denied.

Respectfully submitted,

GLEN A. WILKINSON
Attorney for Respondent

WILKINSON, CRAGUN & BARKER
RICHARD A. BAENEN
JOHN S. WHITE
Of Counsel

APPENDIX A


110 Miles
Royce Area
616
Utah
Colorado 220 Miles
107th Meridian
90 Miles
Royce Area
566
20 Mi
Cession of 1873
15 M.
Royce Area 617
Colo.
New Mexico